Supreme Court of the United States

OCTOBER TERM, 1936.

No. 20

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

Appeal from the Supreme Court of the State of Washington

(184 Wash. 648, 52 Pac. (2d) 1274.)

Appellant's Reply Brief

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This reply will serve to clarify and restate the questions for decision.

FIRST. Confusion may have been caused by appellee's reference to Chapter 227, Laws of 1929, quoted at page 8, and the argument based thereon at page 12 of appellee's brief. Chapter 227, Laws of 1929, is not in question and has no bearing. This is so because appellant withdrew in the Superior

Court its attack on Chapter 107, Laws of 1923, imposing a graduated regulatory fee not to exceed $1500.00. There was left in question only the constitutionality of the greatly increased regulatory fee imposed by Chapter 107, Laws of 1929. (See appellant's brief, p. 4.) Chapter 227, Laws of 1929, quoted by appellee, imposed a graduated fee on *all corporations*. Section 8, apparently overlooked by appellee, provides: "That the annual license fee required to be paid to the Department of Public Works by any *public service company* shall be deducted from the annual license fee provided herein and the excess only shall be collected."

Upon withdrawal of attack on Chapter 107, Laws of 1923, the moderate filing or regulatory fee not exceeding $1500.00, imposed thereby, which had previously been paid, was no longer in issue. Thus, credit was given the state for the fee paid under Chapter 107, Laws of 1923. The amount being equal to the license fee due under Chapter 227, Laws of 1929, no payment was due the Secretary of State by the express provisions of said Section 8 above quoted, and, of course, none was made to that officer. The judgment entered in favor of appellant by the Superior Court was for the amount paid under Chapter 107, Laws of 1929, less the filing or regula-

tory fee payable under said Chapter 107, Laws of 1923.

The account, showing amount paid under Chapter 107, Laws of 1923, and the amount paid under Chapter 107, Laws of 1929, with interest, is set forth in the findings, (Rec. 42 to 43). The explanation is made on page 4 of appellant's brief but seems to have escaped appellee's attention.

We wish to emphasize that we are making no attack on the license fee imposed by Chapter 227, Laws of 1929; that the license fee imposed thereby is not in question; that the judgment rendered in the Superior Court in favor of appellant for $25,-466.47 was for recovery of the regulatory fee and interest paid under Chapter 107, Laws of 1929, less the regulatory fee payable under Chapter 107, Laws of 1923. Consequently, the validity of Chapter 107, Laws of 1929, is the only question presented by this appeal. This explanation should clear up confusion that may have been caused by appellee's reference to Chapter 227, Laws of 1929, and the argument based thereon at page 12 of its brief.

SECOND. Of course we have no quarrel with appellee's argument that statutes are presumed to be valid. True it is that a fee imposed to pay cost

of regulating a utility or inspecting an article will be presumed to be reasonable. If Chapter 107 imposed a fee to pay the cost of supervising and regulating *railroads* the presumption would apply. Such a law would appear to be valid on its face. But Chapter 107 is not such a law. It imposes a fee, not to pay cost of regulating *railroads,* but a flat fee is imposed on railroads *and many unrelated public corporations to pay expense of regulating all of them.* The fee payable by railroads is not limited to the cost of regulating railroads nor is its disbursement restricted to paying that cost. The fees paid by all utility corporations, including railroads, go into a general state fund called the "public service revolving fund" out of which appropriations are made by the legislature to pay *all the expense* of the Department of Public Works. Thus, *even if the Department incurred not one dollar of expense in regulating railroads the fee or tax of 1/10 of 1% would nevertheless be payable each year in full.* It could and would be expended by the Department in regulating telephone, water, electric companies, etc., or for any other of its numerous activities. No more is needed to prove invalidity of the act. Certainly, Chapter 107 is not like the act held valid in *Charlotte, C. & A. R. Co. vs. Gibbes,* 142 U. S. 386, and cases cited in the opinion below.

And with equal assurance we say that Chapter 107 is not like any law imposing regulatory or inspection fees yet sustained by this court. So it is plain that we have here no room for presumption of validity—that is, presumption that the fee imposed to pay cost of *regulating railroads* is not excessive. This is true *because the fee is not imposed for any such purpose.* It is a flat fee imposed on railroads and many unrelated public service corporations to pay cost of regulating *all of them.* Such a law is void on its face because the fee is not imposed for the only purpose for which it can validly be imposed. *Foote vs. Stanley,* 232 U. S. 494, announces the rule applicable to laws like Chapter 107. The Railroad Retirement Case, 295 U. S. 330, is also apposite, for there the defect appeared from the face of the law.

The opinion below is clearly subject to this criticism. In applying the rule that statutes are presumed to be valid, it overlooked the distinction between a statute imposing a regulatory or inspection fee or tax restricted to a lawful purpose, and a general law like Chapter 107. Had the state court held valid a fee to pay cost of regulating railroads and other unrelated utility corporations, irrespective of the reasonable expense of regulating the several

kinds of business done by each, its decision would have been consistent, at least. But when it held that such a fee is presumptively reasonable to pay cost of regulating *railroads*, it did violence to the very terms of the law, for the fee is not imposed to pay the expense of regulating *railroads*. It is payable irrespective of that expense. Under Chapter 107 the expense of regulating railroads, as such, is not made the criterion of reasonableness. The criterion is, (and the act is so administered, Stookey's testimony Rec. 76) the expense of regulating railroads *and* a variety of other unrelated utility companies. Such a law has never been sustained by this court, and we confidently submit that it violates the due process clause of the 14th Amendment.

The state court refers to Rem. Rev. St. Sec. 10361-2, applicable to steamboat companies. As an example of what a valid law should be we quote Sec. 10361-2 in part, as follows:

> "Every steamboat company holding a certificate under this act, shall between the first and fifteenth days of March of each year file with the Department of Public Works, a statement showing the gross operating revenue of such company for the preceding calendar year, or portion thereof, and shall pay to the said department a fee not to exceed one-fifth of one per cent of the amount of such gross operating revenue: Provided, the fee so paid shall in no

> case be less than ten dollars. The percentage of gross operating revenue to be paid as herein provided shall be subject to future adjustment by the department, which percentage, not exceeding one-fifth of one per cent, shall be fixed by the department by general order entered at the beginning of any year. In fixing such rate the department shall take into consideration all moneys on hand paid in by such steamboat companies, to the end that the moneys collected hereunder shall be neither more nor less than sufficient to cover the cost of supervising and regulating such steamboat companies. * * * "

Were Chapter 107, Laws 1929, like the above law it would be presumptively valid and would not afford railroads just cause for complaint.

THIRD. The above is not the only ground of objection to Chapter 107. No less serious is the objection that it imposes a fee to pay expense of all the activities of the department relating to railroads and others, whether of a supervisory or non-supervisory nature. Appellee's brief has little or nothing to say about this objection, nor is it noticed by the opinion below as an objection appearing from the face of the act. The just principle which sustains laws of this kind is that one engaged in a business which requires regulation in the public interest may reasonably be required to pay the cost thereof. Where such regulation is exercised through commissioners, as said in the *Gibbes* case, "their

services are for the benefit of the *railroad corporation* as well as of the public." But this principle does not apply to a tax to pay expenses for which railroads are not responsible. Neither appellee in its brief nor the court below have said that *all* of the manifold duties and activities of the department relating to railroads are of a regulatory or supervisory nature. That they are not is self-evident. Finding X, Rec. 46, has not been questioned either by appellee in this court or by the court below. The objection is sufficiently argued in the opening brief.

We might add that the so-called Oregon "cross state" railroad extension case referred to in Finding X went to this court, *sub nom. Interstate Commerce Commission vs. Oregon-Washington R. & N. Co.*, 288 U. S. 14. Certainly the department in participating in this case was not regulating railroads in the exercise of any power it has or could have under the Public Service Commission Law of Washington quoted in the appendix to appellant's opening brief. The cross state extension did not even touch this state. The department appeared in that case as any other litigant to assist the Interstate Commerce Commission to a correct decision. It is a matter of common knowledge that such litigation is very expensive. The cost, whatever it was, came out of

the fees in question. But such expenses are incurred in the general interest and must be paid as other governmental costs. They cannot be saddled exclusively upon utility corporations in the guise of a regulatory fee.

If the act be invalid on its face there is no occasion to consider its practical operation, and we understand that this was the view of the state supreme court.

FOURTH. We have shown in the opening brief that the accumulation of the amounts contributed by railroads and utility corporations over the period 1929 to 1933 amounted to $224,193.95 over the expenses. How much of this fund was the excess over the cost of regulating railroads and how much the excess over cost of regulating other utilities was not and could not be shown, for the department neither kept nor was required by law to keep any record of the details of its expenditures. The testimony of Mr. Stookey, the department's auditor, (offered, apparently, as an afterthought), that the department's expenses attributable to railroads exceeded by $37,833.14 the amount of railroads' contributions to the revolving fund has been discussed in the opening brief. To what is there said we should add that it was open to appellee to call the employees

of the department having first hand knowledge to testify to the activities which they charged to railroads. It does appear, however, that the department's employees numbered for 1929 an average of 43, for 1930 average of 40, 1931 average of 38, 1932 average of 42, 1933 average of 95 and first eleven months of 1934 average of 142. (Rec. 65.) Not one of them devoted all, or even the greater part of his time, to railroads. Even Lonergan, chief of transportation, was concerned with motor vehicles and other transportation companies, as well as railroads, and had charge also of the department's participation in proceedings before the Interstate Commerce Commission. (Rec. 80-81.) It is noted further that in 1933, when the department began to litigate with the power companies, etc., its employees were more than doubled and in 1934 more than tripled. The entire expense of all this litigation was paid out of the common fund. The auditor testified that the amount paid in by the railroads for 1929-1933, inclusive, was $101,549.00. (Rec. 72.) The disbursements charged to railroads on the time slips was $139,382.00, or $37,833.00 in excess of their contributions. Looking to the department's annual reports in evidence it is plain that no expense even remotely approximating this sum could possibly have been incurred by the department in discharging its *regu-*

latory duties relating to railroads. The reports show that it had but little to do with railroads during this period. On the contrary, it expended the entire balance of the fees on hand in 1933 of $224,193.95, and a great deal more, in litigating with telephone, power, gas and other utility companies. The facts were so found by the trial court and are not questioned either in the opinion below or appellee's brief here.

For convenient reference we reproduce Finding XI, Rec. 48, as follows:

> "The accumulation of the amounts paid by railroads and other public utility corporations and other receipts of the Department over the period 1929 to 1933, inclusive, are shown in the annual reports of the Department to the Governor in a financial statement appended thereto. At the end of 1933, as shown on page 79 of the report for 1933, there was a surplus in the Department's fund amounting to $224,193.95. The receipts of the Department from all sources were in excess of the expenditures of the Department in the performance of its manifold duties and activities during said period by said amount. But no separate accounts were kept or required to be kept, with the various public utility companies concerned, and it is impossible to determine what was the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utility corporations with which the funds contributed by railroads were commingled; and it is impossible to determine what was the ex-

pense incurred by the Department in discharging its functions and duties not relating to supervising and inspecting railroad companies and other public utilities all of which were required by law to be paid and were in fact paid out of said common fund. But the court finds that the activities of the Department connected with the regulation and supervision of railroads are and were at all times relatively unimportant and inexpensive in comparison with the time devoted to and the cost incurred by the Department in regulating and supervising auto transportation companies and motor vehicle operations, and its activities relating to and expenses incurred in the regulation and supervision of telephone, electrical, gas, water and public utility corporations other than railroads and in its nonregulatory activities relating to railroads. The activities of the Department relating to the discharge of its manifold functions and duties are stated in detail in its several annual reports to the Governor offered in evidence in this cause. Said balance of $224,193.95 and said additional sums appropriated by the legislature in 1933 were expended by the Department in 1934 in carrying on investigations of and litigation with public utility corporations other than railroads and with which railroads, including plaintiff, were in no way concerned, as more fully appears from the Department's report to the Governor for 1934. See especially pages 11 and 91 *et seq.* thereof."

FIFTH. We have not overlooked the statement on page 32 of appellee's brief that the auditor's testimony went in without objection from appellant. It is true that appellant did not object to this tes-

timony as it was given. It was not then subject to objection, for it did not appear at that time that it was based upon hearsay. That it was hearsay appeared on cross examination and motion to exclude it was promptly made by appellant. There is another answer to appellee's suggestion that objections were waived because not timely made, namely: that the state supreme court did not refuse to consider the objection but overruled it and held the auditor's testimony admissible. (Rec. 91.) As the state court did not refuse to consider appellant's objection because not timely made, appellee's point is not open in this court.

SIXTH. If more need be said, we emphasize that, even if it be admitted that the expenses attributed by the employees of the department to railroads on the time slips given the auditor were incurred in connection with railroads, our case is not met, because it appears affirmatively that many of the department's activities relating to railroads in which it incurred large expense were not of a supervisory or regulatory nature. This subject has been sufficiently discussed both in this and the opening brief. The state court does not question that this was so. In its discussion of this feature it merely assumed that all expenses relating to rail-

roads were of a regulatory kind for which the railroads could lawfully be required to pay. That the learned court was mistaken in this assumption is established by the uncontradicted evidence.

In conclusion, we feel justified in remarking that appellant has done all that it can fairly be expected to do in waiving its valid objections to the fee payable under Chapter 107, Laws 1923. The fees payable under that chapter are fully as much as can properly be charged to it on account of any and all regulatory and supervisory expense incurred or to be incurred by the department in regulating railroads. Even if it were incumbent upon appellant to prove that this is so the unquestioned findings of the trial court, based upon the department's reports in evidence, establish the fact beyond possibility of successful contradiction.

Respectfully submitted,

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